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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

CARLOS ALBERT PERZABAL,

Defendant and Appellant.

D075131

(Super. Ct. No. INF1401233)

APPEAL from a judgment of the Superior Court of Riverside County, Victoria E. Cameron and Otis Sterling III, Judges. Reversed.

Jill M. Klein, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Michael Pulos, Kathryn Kirschbaum and Michelle Ryle, Deputy Attorneys General, for Plaintiff and Respondent.

Thirteen-year-old Jane Doe 1 and her mother (Mother) lived with 40-year-old defendant Carlos Perzabal and his family in their apartment for a few months. Shortly

after moving out, Jane Doe 1 and Mother called 911 to report that Perzabal had molested Jane Doe 1. Police responding to the 911 call entered Perzabal's apartment on the mistaken belief it was Mother and Jane Doe 1's apartment, and then interviewed Perzabal in his bedroom without first advising him of his *Miranda*¹ rights. After about 40 minutes of accusatory questioning, during which Perzabal repeatedly and consistently denied Jane Doe 1's allegations, he finally admitted he once accidentally touched her vagina in a manner that tended to corroborate some of her allegations.

Perzabal was charged with nine counts of sex offenses—eight as to Jane Doe 1, and one as to another young girl (Jane Doe 2) who also accused Perzabal of sexually abusing her. A jury found him guilty on four counts arising from Jane Doe 1's allegations, but was unable to reach verdicts on all the remaining counts. The trial court sentenced Perzabal to a stipulated 20-year prison sentence.

Perzabal raises three issues on appeal. First, he contends the trial court erred by denying his motions to suppress the evidence police obtained while inside his apartment—his recorded interview, photos the police took, and observations they made—because the police violated his Fourth Amendment rights by entering without a warrant or valid consent. We conclude the trial court properly denied the motions because Mother had apparent authority to consent to the officers' initial entry into the apartment, and Perzabal thereafter consented to their remaining there.

¹ *Miranda v. Arizona* (1966) 384 U.S. 436.

Second, Perzabal contends the trial court erred by denying his motions in limine to exclude his interview on *Miranda* and involuntariness grounds. We agree with the former, but not the latter. As we recently reaffirmed in a highly analogous case, a police interview that begins voluntarily can *become* custodial—thus necessitating a *Miranda* advisement—if, in the totality of circumstances, a reasonable person in the suspect's position would no longer feel free to terminate the interview and leave. (See *People v. Saldana* (2018) 19 Cal.App.5th 432, 455-456 (*Saldana*).) We further conclude this *Miranda* error was prejudicial because this was a close case and the jury convicted Perzabal only on counts that were partially corroborated by his inadmissible admissions.

But we disagree that Perzabal's admissions were involuntary—and thus inadmissible even for impeachment purposes. Although one of the officers told Perzabal that he would "never be able to see [his] kids" again if he did not confess during the interview, the totality of the circumstances shows that Perzabal's will was not sufficiently overborne such that his admissions were involuntary.

Finally, Perzabal contends for the first time that the trial court incorrectly instructed the jury regarding unanimity. On remand, he may raise the issue if the prosecution elects to retry him.

The judgment is reversed.

FACTUAL AND PROCEDURAL BACKGROUND

The Investigation

Mother and Perzabal's wife (Wife) had been best friends since they were teenagers in Mexico. From about October or November 2013 to about January or February 2014,

Mother and Jane Doe 1 rented a room in the Cathedral City apartment unit where Perzabal lived with Wife and their two sons (ages nine and six). At the time, Jane Doe 1 was 12 or 13 years old, and Perzabal was 40 years old. After Mother and Jane Doe 1 moved out, Wife often babysat Jane Doe 1 at the apartment while Mother worked.

In late April or early May 2014, Wife confided in Mother that she suspected Perzabal was having an affair, and she wanted a divorce and custody of their children. Mother, who "never liked" Perzabal and was "angry" at him for "hurting" Wife, said she would help. On May 1 or 2, Mother went with Wife to file divorce-related documents at the courthouse, where they encountered Perzabal doing the same thing.

As a result of the impending divorce, Wife told Mother she expected that Perzabal would move out of the apartment, freeing up space for Mother and Jane Doe 1 to move back in. On May 3, Mother told this to Jane Doe 1 while they were at a laundromat. Jane Doe 1 looked shocked and started to cry. She told Mother she did not want to move back in because Perzabal "had touched her and done many bad things."

Mother dialed 911 and had Jane Doe 1 talk because she spoke better English. Jane Doe 1 told the dispatcher "that there was someone that raped [her] or something like that." Mother gave the dispatcher the address for Perzabal's apartment, then went there to meet responding officers.

Outside the apartment, Mother and Jane Doe 1 met Cathedral City Police Officers Jeffrey Barnett and Alan Lemus. Mother told them Perzabal had sexually assaulted Jane Doe 1. Before inquiring further, Barnett suggested they speak inside due to the sensitive

nature of their discussion and the 100-plus-degree heat. Mother agreed and led them inside Perzabal's apartment.

Once inside, Mother began yelling at Perzabal, who looked surprised. Jane Doe 1 became upset. When the officers realized Perzabal was their suspect, Barnett took Mother and Jane Doe 1 outside while Lemus stayed inside.

Jane Doe 1 told Barnett that Perzabal pulled her into a bathroom, touched her vagina, and made her touch his penis. She denied Perzabal ever "place[d] anything inside of [her]." However, when questioned later by Officer Lemus, Jane Doe 1 said that Perzabal put his fingers inside her vagina.

Meanwhile, inside the apartment, Lemus and another responding officer, Alirio Moulin, questioned Perzabal. We discuss the interview in greater detail in part II.A., *post*. In short, Perzabal denied he ever *intentionally* touched Jane Doe 1 inappropriately (or that she touched him), but he acknowledged he once *accidentally* touched her vagina about four or five years earlier when everyone was on the couch watching a movie. He also acknowledged being in a bathroom alone with Jane Doe 1 once to fix the shower faucet, but he denied touching or being touched by her. After the interview, the officers arrested Perzabal.

A few days later (May 5), a forensic interviewer interviewed Jane Doe 1.² Jane Doe 1 disclosed that Perzabal touched her "[o]ne time" about two months before she and Mother moved out of the apartment. While Wife was shopping, Perzabal took Jane Doe

² The interview was recorded and played for the jury.

1 to his bedroom to watch a movie with his older son. They sat on a "little couch," Perzabal put a blanket over Jane Doe 1, and he started touching her breasts and vagina. The son saw what was happening and threatened to scream. Perzabal warned him not to, and put something over Jane Doe 1's mouth so she could not scream either. He warned her that if she told anyone, "[her] whole family is going to pay." When Perzabal's son left the room, Perzabal pulled Jane Doe 1 into the master bathroom, where he touched the "inside middle part" of her vagina and made her touch his penis. Jane Doe 1 told the forensic interviewer that Perzabal did not do anything else that she "didn't think was right."

A few months after the forensic interview (in August 2014), the prosecutor and her investigator met with Jane Doe 1 and Mother to explain the court process and case status (the follow-up meeting). During this meeting, Jane Doe 1 stated there was additional information she had not disclosed during the forensic interview. Jane Doe 1 then gave an additional statement, a recording of which was played for the jury. Jane Doe 1 clarified that during the incident she had previously described during her forensic interview, Perzabal threatened her by placing a knife against her throat, leaving a scratch.

Jane Doe 1 also told the prosecutor and investigator that Perzabal molested her on five previously undisclosed occasions when she and Mother were visiting after they moved out. On each occasion, Perzabal made Jane Doe 1 place her hands on the ground and her feet on his shoulders, then inserted his fingers into her vagina. Jane Doe 1 denied that Perzabal touched her anywhere else. She said Perzabal's older son saw each incident, but Perzabal threatened the son and her to keep them from telling anyone. Jane Doe 1

confirmed there were no molestation incidents other than the six she had thus far disclosed (one during the forensic interview, five during the follow-up meeting).

During the follow-up meeting, Jane Doe 1 also disclosed she had seen Perzabal lying on his bed with another child, Jane Doe 3, whose mother was also friends with Wife. Investigators tracked down Jane Doe 3, but she did not disclose any abuse. However, her older sister, Jane Doe 2, disclosed that Perzabal molested her once when she was eight or nine years old. She had been watching television with Perzabal and his older son, and when the son left the room, Perzabal picked her up, sat her on his lap on the couch, and touched her vagina. Perzabal told Jane Doe 2 he would hurt her family if she told anyone what happened.

Charges

Based on Jane Doe 1's and Jane Doe 2's disclosures, the prosecution charged Perzabal with nine counts of sex offenses and alleged a multiple-victim enhancement (Pen. Code, § 667.61).³ As to the incident Jane Doe 1 disclosed during her forensic interview (Perzabal touching her breasts and vagina on the couch, then forcing her to touch his penis in the bathroom), the prosecution charged Perzabal with four offenses: one count of forcible lewd conduct on a child under 14 (§ 288, subd. (b)(1); count 1), with a deadly-weapon-use enhancement allegation (§§ 12022, subd. (b), 1192.7, subd. (c)(23)); two counts of lewd conduct on a child under 14 (§ 288, subd. (a); counts 5 and 6); and one count of sexual penetration by force or fear (§ 289, subd. (a); count 8).

³ Further statutory references are to the Penal Code.

As to the incidents Jane Doe 1 disclosed during the follow-up meeting (five occasions of Perzabal touching her vagina while her feet were on his shoulders and her hands on the floor), the prosecution alleged four counts of aggravated sexual assault by means of forcible sexual penetration (§§ 269, subd. (a)(5), 289, subd. (a); counts 2, 3, 4, and 7).⁴

As to the incident Jane Doe 2 disclosed during her interview, the prosecution charged Perzabal with one count of forcible lewd conduct on a child under 14. (§ 288, subd. (b)(1); count 9.)

The Prosecution Case

At trial, Jane Doe 1 (then 16) testified about the incidents she disclosed in the forensic interview and the follow-up meeting. Regarding the latter, she added that on one occasion Perzabal attempted to insert his penis into her vagina. She also recounted Perzabal's threats to her.

In addition, Jane Doe 1 identified several previously undisclosed molestation incidents, including that Perzabal would have her sit on his shoulders while he urinated or touched himself in the bathroom, and that he lifted her onto a pullup bar in his doorway and touched her vagina over her clothing. Jane Doe 1 added that Perzabal touched her "almost every day" during the several months she lived with him, and several times per week when she visited after moving out.

⁴ It is unclear from the record why the prosecution charged Perzabal with only four counts when Jane Doe 1 disclosed five incidents.

The psychologist who conducted Jane Doe 1's forensic interview testified that abuse victims do not always report abuse right away or all at once. Similarly, the district attorney investigator who participated in the follow-up meeting testified that, in her experience, it is more common for abuse victims to make "delayed disclosures than telling everything at once."

Officers Moulin and Lemus testified about their involvement in the case, and an audio recording of their interview of Perzabal was played for the jury.⁵ Moulin testified he saw the couch on which Perzabal admitted accidentally touching Jane Doe 1's vagina, and it appeared to be about 24 inches wide. A photo of the couch was admitted in evidence.

A nurse who conducted a sexual assault exam on Jane Doe 1 in August 2014 (about three months after Jane Doe 1's initial disclosure) testified that the appearance of Jane Doe 1's hymen was "indeterminate," meaning "it neither confirms nor negates that there was penetration." The nurse testified Jane Doe 1's report of pain upon urination after the initial incident was consistent with her reported history.

By stipulation, the prosecution played a recording of a forensic interview of Perzabal's oldest son. The son denied ever seeing his father "do something to [Jane Doe 1] that [he] didn't think was right."

⁵ The interview was conducted in Spanish. The jury was given a transcription that included an English translation.

Finally, Jane Doe 2 (then 12) testified that when she was four or five years old Perzabal touched the outside of her genitals and may have threatened to hurt her family if she told anyone. She acknowledged she knew Jane Doe 1, but denied overhearing anyone discussing Jane Doe 1's accusations against Perzabal.

The Defense Case

Perzabal's defense theme as to Jane Doe 1 was that Mother encouraged her to fabricate the abuse claims because of Mother's loyalty to Wife, and to obtain a type of visa available only to victims of certain crimes.⁶

As to Jane Doe 2, Perzabal pursued a "suggestibility" theme based on the testimony of Wife and Jane Doe 2's mother that they may have discussed Jane Doe 1's accusations in front of Jane Doe 2.

A psychologist who conducted a forensic examination of Perzabal testified that the results of her assessment indicated Perzabal had a "normal heterosexual arousal pattern" with "no finding for deviant sexual interest in young children." The expert also testified children are vulnerable to suggestibility and sometimes make false accusations when caught in the middle of custody disputes or "to exact some revenge."

Jury Verdicts and Sentencing

The jury deliberated for more than two days, asked nine questions, and requested readbacks of Jane Doe 1's testimony and transcripts of recorded interviews. The jury

⁶ Mother testified on cross-examination that she was aware before Jane Doe 1's initial disclosure that a type of visa was available to victims of certain crimes, and that she applied for such a visa on Jane Doe 1's behalf after her disclosure.

found Perzabal guilty on the counts arising from the incident Jane Doe 1 disclosed in her forensic interview (counts 1, 5, 6, and 8). The jury was unable to reach verdicts on the remaining counts pertaining to Jane Doe 1 (counts 2, 3, 4, and 7) and Jane Doe 2 (count 9). The trial court declared a mistrial as to these counts and the multiple-victim allegation, and ultimately dismissed them.

The trial court imposed a stipulated 20-year prison sentence.

DISCUSSION

I. Motions to Suppress on Fourth Amendment Grounds

Perzabal contends the trial court erred by denying his original and renewed motions to suppress the evidence police obtained while inside his apartment because the police violated his Fourth Amendment rights by entering without a warrant or valid consent. We disagree.

A. Background

Perzabal moved (and later renewed his motion) to suppress all the evidence police seized while in his apartment when responding to Jane Doe 1's 911 call.⁷ He argued the evidence was seized in violation of his Fourth Amendment rights because (1) the officers entered his apartment without a warrant, (2) Mother lacked apparent authority to consent to their entry, and (3) Perzabal did not consent to the officers remaining in his apartment. The prosecution opposed both motions.

⁷ The evidence included Perzabal's interview; the officers' observations of Perzabal, his apartment, and his furniture; and photos the police took inside the apartment.

1. *Testimony*

Mother and Officers Barnett, Lemus, and Moulin testified at the hearings on each suppression motion.⁸

(a) *Mother*

Mother testified she called 911 from the laundromat when Jane Doe 1 disclosed the alleged abuse. Mother "gave [the dispatcher] the address of [Perzabal] and [Wife]," but she "only gave the address"—she did not "tell them that it was [Perzabal] and [Wife]'s house."

When Mother and Jane Doe 1 went to the apartment complex, the police were already there. Mother briefly told them why she called 911. When an officer asked Mother if she "wanted to go inside to talk," Mother took them to the apartment. She testified she was uncertain of how exactly they all ended up inside, but she believed that either she or one of the officers knocked on the door, and Perzabal answered and let them in. Mother did not remember whether she told the officers she did not live in the apartment.

(b) *Officer Barnett*

Officer Barnett testified he was the first officer to respond to a dispatch call regarding a possible sexual assault. Upon arriving at the address announced by dispatch,

⁸ The hearing on the original suppression motion coincided with the preliminary hearing, and the hearing on the renewed suppression motion coincided with the hearing on Perzabal's motions in limine to exclude his interview. Perzabal also attached the reporter's transcripts of the original suppression hearing to his renewed motion.

Barnett saw Mother and Jane Doe 1 in front of an apartment complex. Officer Lemus arrived shortly after; he was dispatched because he speaks Spanish and Barnett does not.

Barnett testified that because the temperature was over 100 degrees, he suggested to Mother and Jane Doe 1 that they speak inside. Mother did not state she did not live at the apartment. Instead, she led the officers to the apartment and opened the front door without a key and without knocking. Mother entered first, followed by Lemus, Barnett, and Jane Doe 1.

Inside, Mother began yelling at Perzabal in Spanish. Perzabal had a puzzled look on his face, but did not ask anyone to leave. Jane Doe 1 was "sobbing," "heaving," and "crying hysterically." Lemus told Barnett that Perzabal appeared to be their suspect, so Barnett led Mother and Jane Doe 1 back outside and spoke to them at Mother's car. It was at this point, about 15 or 20 minutes after arriving, that Barnett first learned they had entered Perzabal's apartment, not Mother and Jane Doe 1's. Barnett stayed outside with Mother and Jane Doe 1 for over one hour, while Officers Lemus and Moulin questioned Perzabal inside.

(c) Officer Lemus

Officer Lemus testified he was dispatched to the apartment complex in response to Jane Doe 1's 911 call. When he arrived, he saw Officer Barnett, Mother, and Jane Doe 1 at the front of the apartment. When Barnett asked Mother if they could "go inside" to talk, Mother led them into Perzabal's apartment without knocking or ringing the doorbell. The officers believed Mother and Jane Doe 1 lived in the apartment, and neither told them otherwise.

Inside the apartment, Mother began yelling in Spanish at Perzabal that he had abused Jane Doe 1, who became upset. Lemus told Barnett that Perzabal was their suspect, and Barnett took Mother and Jane Doe 1 outside. Officer Moulin arrived within a few minutes and joined Lemus in the apartment. Perzabal did not ask the officers to leave.

Lemus introduced himself and Moulin as police officers and told Perzabal, "we're going to talk to you." Perzabal responded, "Okay, good." Lemus realized that Perzabal's wife and two sons were in the apartment, so he told Perzabal, "You are not in trouble [¶] . . . [¶] but we need . . . where do you want to talk to us in, in private?" Perzabal responded that the living room was fine. Lemus explained that they "need to talk in private" because he did not "want the kids to hear anything" Perzabal responded that they could speak in his bedroom, and told the officers, "Come here, come here, come here."

The officers interviewed Perzabal in his bedroom for about one hour.

(d) *Officer Moulin*

Officer Moulin testified that the other officers were already in the apartment unit when he arrived on the scene. He heard Lemus's conversation with Perzabal about speaking with him (and needing to do so in private).

2. *Ruling on Original Suppression Motion*

After hearing argument, the court (Hon. Victoria E. Cameron) denied the motion to suppress. The court found the officers had a good-faith belief in Mother's authority to consent to their entering the apartment because they reasonably believed the apartment

was hers. The court also found Perzabal consented to the officers remaining in his apartment because he invited them into his bedroom for a private interview.

3. Ruling on Renewed Suppression Motion

At the hearing on the renewed suppression motion, defense counsel conceded there was "no constitutional Fourth Amendment violation" with Lemus initially entering Perzabal's apartment because the officer "at that point . . . had a good-faith belief that . . . [Mother] and her daughter lived there." But counsel maintained the officers violated Perzabal's Fourth Amendment rights by staying in his apartment without his consent after realizing it was his.

The court (Hon. Otis Sterling III) disagreed. The court reasoned that although Lemus's statement that "we're going to talk to you" could, in some contexts, be viewed as a command, here, the court viewed it as "the opposite of a command" because the officers were simply telling Perzabal they wanted to hear his side of the story. Accordingly, the court denied the renewed suppression motion.

B. Relevant Legal Principles

The Fourth Amendment prohibits "unreasonable searches and seizures." (U.S. Const., 4th Amend.) A "warrantless search is per se unreasonable unless the People prove that the search comes within a recognized exception to the warrant requirement." (*People v. Meza* (2018) 23 Cal.App.5th 604, 609-610; see *Katz v. United States* (1967) 389 U.S. 347, 357; *People v. Macabeo* (2016) 1 Cal.5th 1206, 1213 ["The burden is on the People to establish an exception applies."].)

Although the "Fourth Amendment generally prohibits the warrantless entry of a person's home, whether to make an arrest or to search for specific objects," the "prohibition does not apply . . . to situations in which voluntary consent has been obtained, either from the individual whose property is searched, [citation], or from a third party who possesses common authority over the premises." (*Illinois v. Rodriguez* (1990) 497 U.S. 177, 181 (*Rodriguez*); see *People v. Rivera* (2007) 41 Cal.4th 304, 311.)

In the context of third-party consent, police may rely on the consent of a person whom they "reasonably and in good faith believe[] . . . ha[s] the authority to consent" to a particular search. (*People v. Ledesma* (2006) 39 Cal.4th 641, 703 (*Ledesma*); *Rodriguez, supra*, 497 U.S. at p. 188.) The determination of this "apparent authority" to grant consent "must 'be judged against an objective standard: would the facts available to the officer at the moment . . . "warrant a man of reasonable caution in the belief" ' that the consenting party had authority over the premises? [Citation.] If not, then warrantless entry without further inquiry is unlawful unless authority actually exists. But if so, the search is valid." (*Rodriguez*, at pp. 187, 188-189.)

"The standard of review on a motion to suppress is well established. The appellate court views the record in the light most favorable to the ruling and defers to the trial court's factual findings, express or implied, when supported by substantial evidence. But in determining whether, on the facts so found, the search or seizure was reasonable under the Fourth Amendment, the appellate court exercises its independent judgment." (*People v. Superior Court (Chapman)* (2012) 204 Cal.App.4th 1004, 1011; see *People v. Suff* (2014) 58 Cal.4th 1013, 1053.)

C. Analysis

Based on our independent review of the record, we conclude the responding officers did not violate Perzabal's Fourth Amendment rights because the officers (1) initially entered his apartment based on an objectively reasonable good-faith belief in Mother's apparent authority to consent to their entry, and (2) remained in the apartment with Perzabal's consent.

As to Mother's apparent authority, she provided the 911 dispatcher with an address to which police should respond, but did not indicate it was Perzabal's residence. When the officers arrived at the apartment complex, Mother and Jane Doe 1 met them out front. When Officer Barnett asked if they could speak inside for comfort and privacy, Mother immediately led the officers directly into Perzabal's apartment without knocking or otherwise seeking permission. Mother gave no indication the apartment was not hers. Under these circumstances, it was objectively reasonable for the officers to believe (albeit mistakenly) they were lawfully entering Mother's apartment. (*Ledesma, supra*, 39 Cal.4th at p. 703 ["the police may assume, without further inquiry, that a person who answers the door in response to their knock has the authority to let them enter"].)⁹

Perzabal relies on *United States v. Arreguin* (9th Cir. 2013) 735 F.3d 1168 and *United States v. Reid* (9th Cir. 2000) 226 F.3d 1020 to support the proposition that the

⁹ Perzabal argues *Ledesma, supra*, 39 Cal.4th 641 is distinguishable because the third party in that case opened the door *from inside*, whereas Mother opened the door *from outside*. In light of the apparent dominion and control Mother exerted over Perzabal's apartment from outside, Perzabal's cited distinction is immaterial.

mere fact Mother had *access* to Perzabal's apartment was insufficient to provide an objectively reasonable basis to conclude she had *authority* to consent to police entering it. These cases are inapposite. The *Reid* court found it was unreasonable for police to rely on a houseguest's consent to search the defendant's apartment because the police already knew the houseguest was not on the lease (*Reid*, at p. 1026) and knew more than the houseguest about the apartment's residents (*id.* at pp. 1025-1026). The *Arreguin* court found it was unreasonable for police to rely on a houseguest's consent to search the master suite because police saw the defendant enter the master suite carrying a shoebox and return to the common area without the box, putting the police on notice that the defendant—not the houseguest—controlled the master suite. (*Arreguin*, at pp. 1176-1178.)

Here, by contrast, the police did not have prior or superior knowledge about the occupancy of Perzabal's apartment, nor did they observe anything while outside that put them on notice that someone other than Mother controlled the apartment. Moreover, unlike the police in *Reid* and *Arreguin*, Officers Barnett and Lemus were not seeking to enter the apartment to collect evidence they suspected was inside; they were merely seeking privacy and refuge from the heat. In this context, it was objectively reasonable for the officers to rely on Mother's apparent authority to lead them inside the apartment.

The record also shows that once the officers were inside Perzabal's apartment, he voluntarily consented to their remaining there. The police first realized Perzabal was their suspect when Mother began immediately yelling at him. When Officer Barnett removed Mother and Jane Doe 1 from the apartment, Officer Lemus remained behind and

told Perzabal, "we're going to talk to you," to which Perzabal responded, "Okay, good."

We share the trial court's observation that the tone of this exchange conveys the impression the officers were reassuring Perzabal that they were willing to hear his side of the story—they were not *commanding* him to speak.

This did not change when the officers told Perzabal they "*need* to talk in private." (Italics added.) Although Perzabal initially countered by stating they could stay in the living room, when Lemus explained they needed privacy so that Perzabal's young children would not overhear a mature discussion, Perzabal—instead of asking his wife to take the children outside or into one of the apartment's bedrooms—invited the officers into his bedroom, telling them, "Come here, come here, come here." This is not coercive police conduct that rendered Perzabal's consent involuntary.

Because the police did not violate Perzabal's Fourth Amendment rights by entering and remaining in his apartment, the trial court did not err by denying his motions to suppress.

II. *Motions in Limine on Miranda and Involuntariness Grounds*

Perzabal maintains he was subjected to a custodial interrogation without first being advised of his *Miranda* rights, and thus contends the court erred by denying his motion in limine to exclude his recorded interview on Fifth Amendment grounds. We agree. He also contends the court erred by denying his related motion to exclude the interview on involuntariness grounds. We disagree.

A. Background

1. The Interview

After Mother and Jane Doe 1 left Perzabal's apartment with Officer Barnett, Officers Lemus and Moulin activated their personal recording devices and audio-recorded their ensuing interview of Perzabal.¹⁰

Once Perzabal invited the officers into his bedroom as discussed in part I.A., *ante*, Lemus asked Perzabal to "please have a seat" on a chair. Lemus sat on a couch and Moulin sat by the bed area.

Lemus told Perzabal the police were not "accusing [him] of anything" and just needed to "verify" or "[i]nvestigate" that "everything is good." Perzabal responded, "Yes, that's fine." Lemus then added, "We just want to do the job and we don't like to take innocent people to jail. [¶] . . . [¶] . . . I am not promising you that nobody will be going to jail or anything."

The officers established a rapport with Perzabal by discussing his family background growing up in Mexico, his work bussing tables at a restaurant, his fitness regimen, and his interest in sports.

During this part of the interview, Perzabal explained Mother and Jane Doe 1 moved into his apartment about six months ago. He thought Jane Doe 1 was about 13

¹⁰ The recording was played at trial in three separate audio files totaling approximately one hour. The corresponding Spanish/English transcripts consist of 139 pages. We have listened to the audio files and read the transcripts.

years old, but claimed he knew little else about her. He said the only time he was alone with her was when he gave her a ride to school.

About 11 minutes into the interview, the officers changed their approach and focused on Jane Doe 1. They asked Perzabal if he knew Jane Doe 1 was a cheerleader; suggested she was "very developed" for her age; asked if she "ever dress[ed] sensual for" him; and told him that if Jane Doe 1 "observes you with other eyes," "it's not your fault, it's hers." Perzabal replied, "I don't see her like that," and insisted "nothing happened."

Lemus asked Perzabal if he "pull[ed]" Jane Doe 1 into the bathroom six or seven months earlier. Perzabal said the only time he was in a bathroom with Jane Doe 1 was shortly after she moved in and needed help with the shower faucet. He insisted, " '[F]or God' or 'for my kids,' I did not grab her or pull her or [do] anything. I didn't do anything to her."

Lemus also asked Perzabal if he had an erection and leaned against Jane Doe 1 when he helped her with the shower. Perzabal denied both accusations. Lemus asked, "So why did she say that she saw your penis . . . erect?" Moulin added that Jane Doe 1 also described and drew Perzabal's penis. Perzabal responded, "No, no, no, that is not true."

Lemus told Perzabal, "I am not lying to you," then proceeded to convey Jane Doe 1's accusation: that Perzabal pulled her into the bathroom; took her clothes and underwear off; made her touch his penis; touched her all over, including "playing with her vagina"; and covered her mouth and threatened that if she said anything about it to Mother or Wife, "something will happen" to Jane Doe 1 or Mother. Lemus asked

Perzabal if he knew what DNA was, falsely adding that Jane Doe 1 saved her underwear from that day. Perzabal responded, "That is not true."

Moulin reiterated it was not Perzabal's fault because Jane Doe 1 "dressed very sensual" and "doesn't represent the age she is." Moulin told Perzabal, "the thing we want to know about you is the truth . . . because we know the truth, we have the evidence." Perzabal asked if it was true that they already had evidence. Moulin responded that it was, but they "want to know from you, that the truth comes from your heart, is what we are looking from you." Perzabal replied, "Well no, if you say it's true that's fine, but truthfully I didn't do anything to her."

At that point, one of Perzabal's sons entered the bedroom, followed by Wife, who removed the son from the room.

Lemus then repeated Jane Doe 1's accusation, elaborating that she claimed Perzabal touched her with two fingers. Lemus said Jane Doe 1 remained silent because of Perzabal's threat, but came forward when Mother told her they were going to move back in.

Perzabal explained Mother was "very upset" with him because he and Wife were in the process of divorcing, and just two days earlier he ran into Wife and Mother at the courthouse and discussed child custody. Lemus interjected, "I'm going to be sincere, hold on." Perzabal wanted to finish explaining his theory about Mother's motive, but Lemus said, "No, no, no, no, no."

Keying in on the custody dispute, Lemus asked, "You want your kids, huh? [¶] . . . [¶] Okay, I'm going to explain what happens in California." Lemus and Moulin

then warned that if Perzabal did not come clean now, "when the evidence is presented in court everyone is going to see you as a liar." Perzabal repeatedly denied Jane Doe 1's accusation.

Lemus then warned Perzabal about the consequences of not speaking up now:

"Let's say that this goes . . . to court . . . [¶] . . . [¶] [Y]ou know that . . . if they find you guilty because you didn't say your story, what happened, you are considered a . . . sexual predator? So, you will never be able to see your kids. I know that your kids are your world, your heart and all. So look, I am telling you with my heart in my hand because I am not going to lie to you here. If they were to find you . . . a sexual predator, I'm sorry to tell you, but you will never be able to see your kids. . . . So, look if you go to court and you explain what happened, everything is on paper and you say, 'you know what? This and this and this is what happened, this is what happened.' You have more opportunity for the judge to say, 'okay I'm going to allow for this guy to see his kids.' If you don't say what happened and we base it just on what she says . . . because remember, we are not dumb, we are not going to ignore what she said, the judge is not going to ignore what she said [¶] . . . [¶] If you go to court and find you as a sexual predator because you didn't say what happened and because we are basing it on what . . . she is telling us and in the evidence that we have. [¶] . . . [¶] . . . [M]ost likely is that you will not get out of jail and that you will never see your kids. I know that your kids are your heart to you."

Perzabal replied, "My God. [¶] . . . [¶] Why do . . . they do this to me? I didn't . . . do anything."

Moulin joined in: "What's done is done. Okay, sorry. What's done is done, because we have the evidence. But we want to know the truth from you. The truth will help you a lot." Moulin reiterated that Jane Doe 1 is "very developed," "very sensual," and "provocative."

At this point, over 33 minutes into the interview, Perzabal asked, "Do I have a right to an attorney?" Lemus replied, "Huh?" Perzabal repeated, "Do I have a right to an attorney?" Lemus responded that Perzabal would have an attorney in court:

"Like I said, when you go to court you will speak to your attorney and all, and like I told you, if they find you guilty and all, you can forget about the kids. . . . If you want to stick to this story, go ahead, but then remember that later you will not be able to change your opinion. When this goes to court you will not be able to change your opinion. And even if you tell your attorney, 'you know what, I want to do this,' you know what, it stays like that, and your kids, forget it, you will not be able to see them. I am telling you this like that, man to man."

Perzabal responded, "I didn't do anything. [¶] . . . [¶] From man to man I am telling you, I did not do anything."

After stating Jane Doe 1 looked mature for her age and that it can be difficult for men to deal rationally with women, Lemus asked Perzabal repeatedly why Jane Doe 1 would say he pulled her into the bathroom and touched her. Perzabal repeatedly stated he "didn't do anything to her," and explained he only went to the bathroom to help her with the shower.

At this point, one of Perzabal's sons entered the bedroom again. Perzabal told Wife or the officers, "Now if you like you can lock the door."

When Lemus asked again why Jane Doe 1 would say that Perzabal forced her to touch him and touched her all over, Perzabal explained "that she has problems at her school." Lemus replied, "Look, problems, we all have problems."

Moulin then repeatedly asked Perzabal about Jane Doe 1 touching his penis, whether he threatened her to keep quiet, and whether she ever saw him naked, adding that

"she drew [Perzabal's] penis very precisely." Perzabal repeatedly denied doing anything to Jane Doe 1.

After several exchanges of questions and denials between Lemus and Perzabal, Perzabal said, "No, calm down." Lemus responded that he noticed Perzabal is "very, very religious." Perzabal replied, "Yes, but calm down." Lemus stated, "There is a God." Perzabal responded, "Don't get mad." After repeatedly appealing to Perzabal's spirituality, Lemus asked, "Do you want to stay with this or do you want to tell me what happened?" Perzabal insisted, "That is what happened. I just help[ed] her with her bathroom, turned on the water and that was all that happened."

Lemus asked again whether Perzabal touched or covered Jane Doe 1, and why she would say he had. Perzabal explained Mother and Wife "are good friends" and "maybe [Mother] got mad or something and did something."

At this point, now about 38 minutes into the interview, Lemus again appealed to Perzabal's spirituality and gave the following admonition before leaving the room for a few minutes to speak with Officer Barnett outside:

"So think very good. I will come back right now and think. Stay with him and think about what you're going to say. If you want to stay with that, ah, let's finish, I just don't want to . . . waste your time, I don't want to waste my time. If you want it to stay like this, I will write what you said, I will write what she told me and you know what? And I will put the things, the evidence down, okay? So let's do it like this, . . . you go to court and like I told you, if in court they . . . find you guilty that you are a . . . sexual predator, forget about the kids. And I am telling you straight up. So stay here and think very well. . . . [To Moulin:] I will be right back, stay with him. . . ."

Lemus left the bedroom, closing the door behind him.

Moulin reiterated to Perzabal that Jane Doe 1 had drawn and described his penis "very well" and that "the evidence from DNA [is] for you." Perzabal speculated that the DNA may have come from papers he and his wife used to clean themselves after sex, which Jane Doe 1 may have later retrieved from his unlocked room.

At some point Lemus returned and told Perzabal that although "it's a violation to touch," "touching could be fought in court" if he touched Jane Doe 1 accidentally. Perzabal said any touching was limited to hugging or playing when there were "lots of us" around. He repeatedly and adamantly denied pulling Jane Doe 1 into the bathroom, or touching her breasts, vagina, or buttocks. Perzabal punctuated his denials with the following: "Look, [f]or God['s sake], look, for whatever you love the most, believe me, I didn't do—I didn't touch [any]thing." Moulin responded, "Why do you doubt the evidence?"

Moulin returned to the issue of whether Jane Doe 1 had ever seen Perzabal naked, telling him, "she drew you really well." Perzabal asked how Moulin would know since he had never seen Perzabal's penis. Moulin acknowledged, "I didn't see, and I don't want to see," but "they're going to put you in jail" and a "specialist will look and will do the comparison."

Lemus then stated, "Look, if she's a liar what does that say about you, that you raped" Perzabal interjected, "No, no you've cross[ed] the line, no man" Lemus

told Perzabal he would be better off admitting to touching Jane Doe 1 than to raping her.

Lemus then received a radio call and it appears he left the room again.¹¹

While Lemus was out of the room, Perzabal told Moulin he recalled an incident from four or five years ago when he may have accidentally touched Jane Doe 1's vagina when she sat down on his hand while he was asleep on the couch as everyone was watching a movie. Moulin asked if Jane Doe 1's vagina "felt . . . wet." Perzabal responded, "Well yes I was asleep I felt it was like that and when I felt I went 'oh shit, sorry.' " Perzabal clarified that his hand only touched the outside of Jane Doe 1's vagina.

Returning to Jane Doe 1's bathroom accusation, Lemus (who had rejoined the interview) told Perzabal that Jane Doe 1 reported that Perzabal's older son witnessed the incident. Moulin added that the son was "talking with sincerity" and "is speaking the truth." Perzabal repeatedly denied that anything happened in the bathroom. Lemus later revealed to Perzabal that he had spoken with the son, who denied seeing anything in the bathroom.

When the officers asked again why Jane Doe 1 would lie about him, Perzabal reiterated his theories that "[s]he has a lot of problems" and that Mother was angry at him for seeking to divorce her friend.

¹¹ Lemus testified he left the interview twice—first to talk to Officer Barnett, then to talk to Jane Doe 1.

In response to further questioning, Perzabal repeatedly denied Jane Doe 1's accusations, saying, "Let it go to court." He speculated that if she ever saw his penis, it happened accidentally and unbeknownst to him when he was getting out of the shower and did not know anyone was around. Similarly, he speculated that if she ever touched his penis, it happened unbeknownst to him when he was asleep.

Moulin again asked Perzabal if he was calling Jane Doe 1 and his son liars. Perzabal said he was not, but insisted he was telling the truth in denying Jane Doe 1's accusations.

Toward the end of the interview, Lemus and Moulin discussed in English (despite Perzabal's request that they speak Spanish) whether they should "just tell [their supervisor] that [Perzabal] already locked himself in on th[e] story" about the touching. When Perzabal asked the officers to tell him "sincere[ly]" what was going to happen to him, Lemus responded that there were 15 police officers outside and "they are going to talk and go and see" how to proceed. Lemus began gathering Perzabal's demographic information, and the interview concluded with officers agreeing to go talk "[t]o the Sarge."

Perzabal was arrested shortly after the interview concluded.

2. The Motions in Limine

Perzabal moved in limine to exclude his prearrest statement on the grounds (1) he was subject to custodial interrogation without a *Miranda* advisement, and (2) his statement was involuntary.

As noted, the hearing on these motions coincided with the hearing on Perzabal's renewed suppression motion, at which Officers Lemus and Moulin testified. The officers testified they did not handcuff Perzabal, draw their weapons, or tell him he could not leave. They also acknowledged they did not advise him of his *Miranda* rights or tell him he was free to leave and did not have to talk to them.

The officers agreed Perzabal continually denied wrongdoing despite their use of various interview tactics—employing the ruse of nonexistent DNA evidence and drawings of his penis; referring to Jane Doe 1's physical characteristics; asking Perzabal if he was calling Jane Doe 1 and his son liars; and telling him he would never see his children again. The officers further acknowledged Perzabal asked if he was entitled to an attorney, but they explained they "didn't have to" advise him of his *Miranda* rights because "he was not under arrest" and "not in custody."

After hearing argument, the trial court (Judge Sterling) denied Perzabal's motions. As to the *Miranda* ground, "taking all the circumstances into consideration," the court did not "believe, objectively, that a reasonable person would have viewed themselves as being in custody or under arrest." The court cited the fact there were only two officers present during the interview (though more may have been outside the apartment); "the tone of voice of the officers was fairly conversational"; "they were all sitting down during the course of the interview"; "[o]ther people were allowed to freely come and go" without objection from the officers; and the interview took place in Perzabal's own bedroom.

As to voluntariness, the court found the officers "just basically used the tactics that the law allows them to use, and it wasn't overly aggressive, so [the court] [did]n't think it

turned it into a coercive-type situation where they tried to coerce information out of him." In this regard, the court found persuasive the fact Perzabal "maintained his position that he hadn't done anything." Regarding Perzabal asking Lemus to "calm down" during the interview, the court found "the tone was the same" and "there was nothing [the court] heard that leads [it] to believe that the officer was doing anything aggressive or threatening any type of physical harm."

B. *Relevant Legal Principles*

Miranda "and its progeny protect the [Fifth Amendment's] privilege against self-incrimination by precluding suspects from being subjected to custodial interrogation unless and until they have knowingly and voluntarily waived their rights to remain silent, to have an attorney present, and, if indigent, to have counsel appointed." (*People v. Gamache* (2010) 48 Cal.4th 347, 384.) "The obligation to administer *Miranda* warnings attaches only when the person questioned is in ' "custody." ' " (*Saldana, supra*, 19 Cal.App.5th at p. 454, quoting *Stansbury v. California* (1994) 511 U.S. 318, 322; see *People v. Aguilera* (1996) 51 Cal.App.4th 1151, 1161 (*Aguilera*).)¹²

"An interrogation is custodial, for purposes of requiring advisements under *Miranda*, when 'a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.' " (*People v. Moore* (2011) 51 Cal.4th 386, 394-395, quoting *Miranda, supra*, 384 U.S. at p. 444.) "When there has been no formal

¹² The Attorney General does not dispute that the police interrogated Perzabal. We therefore focus on the *custody* prong of *custodial interrogation*.

arrest, the question is how a reasonable person in the defendant's position would have understood his situation." (*Moore*, at p. 395.) That is, "would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave"? (*Thompson v. Keohane* (1995) 516 U.S. 99, 112; see *Moore*, at p. 395; *Saldana*, *supra*, 19 Cal.App.5th at p. 455.)

"Courts have identified factors that are relevant in determining whether the defendant was in custody during police questioning." (*Saldana*, *supra*, 19 Cal.App.5th at p. 455; see *Aguilera*, *supra*, 51 Cal.App.4th at p. 1162.) "No one factor is dispositive. Rather, we look at the interplay and combined effect of all the circumstances to determine whether on balance they created a coercive atmosphere such that a reasonable person would have experienced a restraint tantamount to an arrest." (*Aguilera*, at p. 1162; see *Saldana*, at p. 455.) The relevant factors include:

"[(1)] whether contact with law enforcement was initiated by the police or the person interrogated, and if by the police, whether the person voluntarily agreed to an interview;

"[(2)] whether the express purpose of the interview was to question the person as a witness or a suspect;

"[(3)] where the interview took place;

"[(4)] whether police informed the person that he or she was under arrest or in custody;

"[(5)] whether they informed the person that he or she was free to terminate the interview and leave at any time and/or whether the person's conduct indicated an awareness of such freedom;

"[(6)] whether there were restrictions on the person's freedom of movement during the interview;

"[(7)] how long the interrogation lasted;

"[(8)] how many police officers participated;

"[(9)] whether they dominated and controlled the course of the interrogation;

"[(10)] whether they manifested a belief that the person was culpable and they had evidence to prove it;

"[(11)] whether the police were aggressive, confrontational, and/or accusatory;

"[(12)] whether the police used interrogation techniques to pressure the suspect; and

"[(13)] whether the person was arrested at the end of the interrogation." (*Aguilera, supra*, 51 Cal.App.4th at p. 1162; see *Saldana, supra*, 19 Cal.App.5th at p. 455.)

" 'Whether a defendant was in custody for *Miranda* purposes is a mixed question of law and fact.' " (*Moore, supra*, 51 Cal.4th at p. 395.) "On appeal, we accept the trial court's findings of historical fact if supported by substantial evidence but independently determine whether the interrogation was 'custodial.' " (*Aguilera, supra*, 51 Cal.App.4th at p. 1161; accord, *Moore*, at p. 395.) "[T]o the extent the interview is tape-recorded," as is the case here, "[t]he facts surrounding an admission or confession are undisputed" and thus "subject to our independent review." (*People v. Linton* (2013) 56 Cal.4th 1146, 1177; see *People v. Jackson* (2016) 1 Cal.5th 269, 339.)

Applying these principles, we recently concluded in *Saldana, supra*, 19 Cal.App.5th 432 that a police interview that began as investigatory at some point transitioned to an accusatory custodial interrogation that entitled the defendant to a *Miranda* advisement. (*Id.* at pp. 455-456.) The defendant in *Saldana* voluntarily

reported to a stationhouse for questioning at the police's request after two young neighbors reported he had molested them. (*Id.* at pp. 439-441.) Although the door to the interview room was closed, the police told the defendant at the outset that he was not under arrest and could leave whenever he wanted because " 'we're not going to arrest you right now.' " (*Id.* at p. 442.) About 38 minutes later, the defendant confessed. (*Id.* at p. 447.) "By then," we opined, "the circumstances had significantly changed." (*Id.* at p. 457.)

Applying the custody factors outlined above, we observed: "No longer were police asking [the defendant] biographical or open-ended questions to hear his version of what happened. To the contrary, long before [the defendant] confessed, the detective asked an unrelenting number of accusatory questions" (*Saldana, supra*, 19 Cal.App.5th at p. 457.) "[T]he accusatory nature of the questioning . . . objectively conveyed that [the defendant] was not free to leave." (*Id.* at p. 462.)

We found the *Miranda* error prejudicial in *Saldana* because (1) "there were no independent witnesses"; (2) the young victims could "fairly be described as less than reliable"; (3) "there was credible expert testimony favoring" the defendant regarding suggestibility; (4) "in closing argument, the prosecutor hammered the jury with [the defendant]'s confession"; and (5) "during deliberations, the jury asked to watch the videotaped confession again," reaching a verdict shortly thereafter. (*Saldana, supra*, 19 Cal.App.5th at p. 463.)

C. Analysis

1. Miranda Error

This case is much like *Saldana*, *supra* 19 Cal.App.5th. 432. But despite the fact Perzabal spends about nine pages of his opening brief analogizing to *Saldana*, the Attorney General does not discuss, nor cite, *Saldana* in the respondent's brief. Based on our independent review of the record in light of the custody framework set forth by our court in *Saldana*, we conclude that although the interview began as noncustodial, "the circumstances had significantly changed" (*Saldana*, *supra* 19 Cal.App.5th at p. 457) well before Perzabal admitted to accidentally touching Jane Doe 1's vagina, thus obligating the officers to advise Perzabal of his *Miranda* rights. On this record, their failure to do so was prejudicial.

To be sure, many factors suggest the interview began as noncustodial. The interview occurred in Perzabal's home. (See *Saldana*, *supra*, 19 Cal.App.5th at p. 456 [an interview subject is " ' "more keenly aware of his rights and more reluctant to tell of his indiscretions or criminal behavior within the walls of his home." ' "].) He agreed to speak with the officers, who sat throughout most of the interview and only slightly outnumbered him.¹³ The officers told Perzabal he was "not in trouble" and they were not "accusing [him] of anything."

¹³ Although Perzabal knew that at least one additional officer (Barnett) was outside, it was not until after Perzabal made his inculpatory statements that Lemus told him there were 15 additional officers outside. Thus, this statement is immaterial to our analysis.

On the other hand, although the interview occurred in Perzabal's home, he had not initially invited the officers inside—they entered under mistaken circumstances. Once there, the officers acknowledged they immediately determined Perzabal was their suspect and questioned him as such. And although the officers initially told Perzabal he was not in trouble, Lemus also warned that he was "not promising . . . that nobody will be going to jail" and that the police "don't like to take innocent people to jail." These conditional statements reasonably suggested that although the officers did not consider Perzabal to be in custody when the interview *started*, the situation could change based on how he answered their questions. (See *Saldana, supra*, 19 Cal.App.5th at p. 457 ["after telling [the defendant] he was free to leave, the detective said, 'Um, we're not going to arrest you *right now*'—suggesting that [the defendant] might well be arrested later"], italics added.)

Further, the officers rejected Perzabal's suggestion that the interview take place in the living room, and twice insisted they needed to speak with him in private. (See *Miranda, supra*, 384 U.S. at p. 449 ["the 'principal psychological factor contributing to a successful interrogation is privacy' "], italics omitted.) Regardless of the officers' explanation for seeking privacy (to prevent Perzabal's children from overhearing a mature conversation), doing so effectively isolated him from his support network and confined him in a closed space with two armed police officers.¹⁴ He was not completely isolated,

¹⁴ Moulin testified he (like many officers) has a habit of resting his hand on his firearm when he stands, which could reasonably be construed as threatening. However, the officers testified (and the trial court found) they were seated during the interview, which suggests Moulin was not touching his firearm.

of course, because his children entered the room twice, and it was *Perzabal* who thereafter asked that the door be locked.

On balance, we conclude that when the interview *began* it was noncustodial and a *Miranda* advisement was not required.

But well before Perzabal admitted about 40 minutes into the interview that he accidentally touched Jane Doe 1's vagina, the interview *became* custodial. The officers shifted from rapport-building, open-ended questions to "an unrelenting number of accusatory questions" (*Saldana, supra*, 19 Cal.App.5th at p. 457) that presumed Perzabal was guilty and they had the evidence to prove it.

" '[A]ccusatory questioning is more likely to communicate to a reasonable person in the position of the suspect, that he is not free to leave' than would general and neutral investigative questions. Thus, on the issue of custody, courts consider highly significant whether the questioning was brief, polite, and courteous or lengthy, aggressive, confrontational, threatening, intimidating, and accusatory." (*Aguilera, supra*, 51 Cal.App.4th at p. 1164; see *Saldana, supra*, 19 Cal.App.5th at p. 459.)

Officers Lemus and Moulin " 'dominated and controlled the [interview]' " (*Saldana, supra*, 19 Cal.App.5th at p. 455) by dismissing Perzabal's explanations and countering with pointed questions, accusations, and references to false evidence. (*Id.* at p. 458 ["[I]n light of the detective's repeated rejection of [the defendant]'s denials, a reasonable person in [the defendant]'s position eventually would have realized that telling the 'truth' meant admitting the detective's information was correct—and that until this 'truth' came out, the person could not leave."].) For example, when Perzabal posited that

Jane Doe 1 might be fabricating her accusations because Mother was angry (on Wife's behalf) that he was seeking child custody, Lemus did not allow him to finish explaining his theory and responded by warning Perzabal that if he did not come clean he might never see his children again. Similarly, when Perzabal posited that Jane Doe 1 might be fabricating her accusations because "she has problems at her school," Lemus responded bluntly that "we all have problems," and Moulin resumed questioning Perzabal about Jane Doe 1's accusations.

The officers also "manifested a belief [Perzabal] was culpable and they had evidence to prove it." (*Saldana, supra*, 19 Cal.App.5th at p. 459.) Moulin told Perzabal "the thing we want to know about you is the truth . . . because we know the truth, we have the evidence." Moulin reiterated, "What's done is done, because we have the evidence. But we want to know the truth from you." Moulin also asked Perzabal, "Why do you doubt the evidence?"

For his part, Lemus responded to Perzabal's denials by asking, "Do you want to stay with this or do you want to tell me what happened?" Lemus followed up by suggesting that if Perzabal "want[s] to stay with that, . . . let's finish" because Lemus did not want to waste their time.

The officers asked Perzabal accusatory questions and "used interrogation techniques to pressure" him. (*Saldana, supra*, 19 Cal.App.5th at p. 459.) The officers admittedly used a ruse of falsely claiming they had several pieces of evidence. First, they falsely told Perzabal they recovered his DNA from Jane Doe 1's underwear. Second, Moulin repeatedly misrepresented that Jane Doe 1 had described and drawn Perzabal's

penis "really well," and warned that a specialist at the jail would compare his penis to her description and drawing.¹⁵

The officers also admittedly used the interview tactics of focusing on Jane Doe 1's attributes and minimizing Perzabal's alleged conduct. The officers repeatedly remarked that Jane Doe 1 was "very developed" for her age and may have dressed "sensual[ly]" for Perzabal such that "it's not [his] fault, it's hers." Lemus also told Perzabal he would be better off admitting to touching Jane Doe 1 than to raping her, because accidental "touching could be fought in court."

Lemus also used the technique of repeatedly threatening Perzabal that if he did not confess during the interview, he would never see his children again.¹⁶

The officers' "insistence that [Perzabal] was guilty, [their] disbelief of [his] many denials, and [their] use of classic interrogation techniques reflects the sort of police-dominated atmosphere that *Miranda* warnings were intended to counteract." (*Saldana, supra*, 19 Cal.App.5th at p. 460.) "Insisting on the 'truth' until [Perzabal] told [them] what [they] sought, the objective message conveyed was that [Perzabal] would be interrogated until he admitted touching [Jane Doe 1]." (*Ibid.*)

Despite the officers' use of these interrogation techniques, the Attorney General maintains Perzabal was not in custody because, as the trial court observed, "the tone of

¹⁵ The officers also falsely stated Perzabal's son had witnessed the alleged bathroom incident, but this happened after Perzabal made his inculpatory statements. Thus, this conduct is immaterial to our analysis.

¹⁶ We discuss these threats in greater detail in part II.C.3, *post*.

voice of the officers was fairly conversational" during the interview. Based on our review of the audio recordings, we agree the tone remained conversational, even when Perzabal asked Lemus to "calm down." However, "a pleasant and conversational tone of voice does not negate the inherently coercive nature of this interrogation in the absence of *Miranda* warnings." (*Saldana, supra*, 19 Cal.App.5th at p. 460.)

After the officers used these interrogation techniques for about 30 minutes, Perzabal asked if he "ha[d] a right to an attorney." Lemus responded that Perzabal could "speak to [his] attorney" when he "go[es] to court." After five more minutes of questioning, Lemus left the bedroom to speak with Officer Barnett outside. When Lemus left, he told Moulin to stay with Perzabal, and closed the door behind himself. This reasonably suggested to Perzabal that he was not free to leave.

It was only after all this occurred that Perzabal admitted—about 40 minutes into the interview—that he accidentally touched Jane Doe 1's vagina. The police arrested him shortly thereafter. (*Saldana, supra*, 19 Cal.App.5th at p. 461.) When police finally advised Perzabal of his *Miranda* rights, he invoked them.

"Taking into consideration all the factors, we hold that well before [Perzabal]'s confession, a reasonable person in his circumstances would not have felt free to leave." (*Saldana, supra*, 19 Cal.App.5th at p. 461.) Thus, he "was in custody during the interrogation and his confession was inadmissible." (*Ibid.*)

That said, and as our court pointed out in *Saldana*, the interview tactics Officers Lemus and Moulin employed "are not unusual, nor are they unreasonable. In fact, if [Perzabal] had been properly *Mirandized* and made the same confession, it might be

called good police work. But such an interrogation is associated with 'the full-blown interrogation of an arrestee, and except for a *Miranda* advisement, we cannot conceive how [Perzabal's] interrogation might have differed had he been under arrest." (*Saldana, supra*, 19 Cal.App.5th at p. 460, quoting *Aguilera, supra*, 51 Cal.App.4th at p. 1165.)

2. Prejudice

Having found *Miranda* error, we must now determine whether it was prejudicial. "We review *Miranda* error under the 'harmless beyond a reasonable doubt' standard propounded in *Chapman v. California* (1967) 386 U.S. 18, 24" (*Aguilera, supra*, 51 Cal.App.4th at p. 1166.)

We find the *Miranda* error here prejudicial for the same reasons as in *Saldana*: (1) this was a close, quintessentially "he said, she said" case, with no third-party witnesses or physical evidence; (2) Jane Doe 1's delayed and multiple disclosures changed over time and occasionally conflicted; (3) Perzabal presented a strong defense case of motive and suggestibility; (4) the prosecutor stressed during closing argument that Perzabal's admissions corroborated Jane Doe 1's testimony; and (5) the jury deliberated for several days and asked several questions, including requesting readbacks of Jane Doe 1's testimony and transcripts and audio recordings of Perzabal's police interview. (See *Saldana, supra*, 19 Cal.App.5th at p. 463; *People v. Esqueda* (1993) 17 Cal.App.4th 1450, 1487 [error prejudicial where "prosecutor heavily relied upon . . . statements made at the [defendant's] interviews during closing argument"]; *People v. Pearch* (1991) 229 Cal.App.3d 1282, 1295 ["Juror questions and requests to have testimony reread are indications the deliberations were close."].)

In light of the fact the jury convicted Perzabal *only* on the counts partially corroborated by his admission—while not reaching verdicts on any of the remaining counts as to Jane Doe 1 or Jane Doe 2—we cannot say beyond a reasonable doubt that the erroneous admission of his statement did not adversely affect the outcome of the trial. Accordingly, we must reverse Perzabal's convictions.

3. *Voluntariness*

Although we are reversing on *Miranda* grounds, for the trial court's guidance on remand we will address Perzabal's contention that his admissions were involuntary and therefore inadmissible for any purpose, including to impeach Perzabal's testimony. (See *People v. Underwood* (1964) 61 Cal.2d 113, 120 [an "involuntary confession[] may not be used for purposes of impeaching the testimony of the accused."], italics omitted.) We conclude Perzabal's admissions were voluntary.

The prosecution must prove by a preponderance of the evidence that a defendant's statements were voluntarily made before they can be admitted. (*People v. McWhorter* (2009) 47 Cal.4th 318, 346.) " 'A statement is involuntary if it is not the product of " 'a rational intellect and free will.' " ' " (*Ibid.*) " 'The test for determining whether a confession is voluntary is whether the defendant's "will was overborne at the time he confessed." ' " (*Id.* at pp. 346-347.) " 'A confession may be found involuntary if extracted by threats or violence, obtained by direct or implied promises, or secured by the exertion of improper influence.' " (*Id.* at p. 347.) " '[C]oercive police activity is a necessary predicate to establish an involuntary confession, [but] it "does not itself compel a finding that a resulting confession is involuntary." ' " (*Ibid.*) On appeal, we

independently review the trial court's ultimate finding as to voluntariness, but will uphold its factual findings as to the surrounding circumstances if supported by substantial evidence. (*People v. Carrington* (2009) 47 Cal.4th 145, 169 (*Carrington*).)

Perzabal contends the officers' interrogation techniques rendered his admissions involuntary. We disagree. As noted above, the interview tactics employed by Officers Lemus and Moulin would have been acceptable had they first advised Perzabal of his *Miranda* rights. (See *Saldana, supra*, 19 Cal.App.5th at p. 460; see also *People v. Falaniko* (2016) 1 Cal.App.5th 1234, 1250 ["investigating officers may freely encourage honesty and lawfully discuss any ' "naturally accru[ing]" ' benefit, advantage or other consequence of the suspect's truthful statement"]; *Carrington, supra*, 47 Cal.4th at p. 174 [" ' "[m]ere advice or exhortation by the police that it would be better for the accused to tell the truth when unaccompanied by either a threat or a promise does not render a subsequent confession involuntary" ' "].) But this *Miranda* error did not render the statements *involuntary*.

Citing *United States v. Tingle* (9th Cir. 1981) 658 F.2d 1332, 1336 (*Tingle*), Perzabal argues Officer Lemus's threats that Perzabal would never see his children again rendered his admissions involuntary. We disagree. In *Tingle*, an FBI agent determined at the beginning of an interview that the defendant was the mother of a two-year-old child. (*Id.* at p. 1334.) "In an effort to obtain a confession, [the agent] told her . . . she would not see the child for a while if she went to prison His purpose was to make it clear to her that she had 'a lot at stake.'" (*Ibid.*) The defendant "began to sob," "was noticeably shaking," and "continued to cry for at least ten minutes" before ultimately

confessing. (*Ibid.*) Citing the "primordial and fundamental value" of the parent-child relationship (*id.* at p. 1336), the federal appellate court found the defendant's confession involuntary because the FBI agent "exert[ed] . . . 'improper influence' " by "deliberately prey[ing] upon the maternal instinct and inculcat[ing] fear in a mother that she will not see her child in order to elicit 'cooperation' " (*Ibid.*)

We recognize that the statements Officer Lemus made were similar to those of the FBI agent in *Tingle*. Lemus repeatedly exploited Perzabal's expressed vulnerability to losing his children. Lemus repeatedly implied—if not outright represented—that if Perzabal did not confess during the interview, he would be branded "a liar" and a "sexual predator," and he "will never see [his] kids."

But the record does not support that Lemus's threats—or the officers' other conduct—overbore Perzabal's will. Perzabal did not "sob," "shak[e]," or "cry for at least ten minutes." (*Tingle, supra*, 658 F.2d at p. 1334.) Rather, as the trial court observed, the audio recordings reflect that Perzabal and the officers maintained a fairly conversational tone throughout the interview. Nor did Lemus's threats procure a confession. To the contrary, Perzabal repeatedly and adamantly denied Jane Doe 1's specific allegations. He ultimately admitted only one accidental touching that only obliquely resembled Jane Doe 1's accusations.

On this record, the prosecution met its burden of showing Perzabal's admissions were voluntary.

III. *Unanimity Instruction*

The trial court instructed the jury regarding unanimity with CALCRIM No. 3501, which applies when generic testimony of the offense is provided. Perzabal did not object. On appeal, however, Perzabal contends for the first time that the trial court should have instructed the jury with CALCRIM No. 3502, which applies when the prosecution has elected a specific factual basis for the offense. If the prosecution elects to retry Perzabal on remand, he may request an appropriate unanimity instruction from the trial court at that time.

DISPOSITION

Reversed.

HALLER, J.

WE CONCUR:

BENKE, Acting P. J.

DATO, J.